

STATE OF MICHIGAN  
COURT OF APPEALS

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PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

MELVIN BUCKNER ARNETT,

Defendant-Appellant.

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UNPUBLISHED

July 22, 2003

No. 238741

Washtenaw Circuit Court

LC No. 00-001580-FC

Before: Neff, P.J., and Fort Hood and Borrello, JJ.

PER CURIAM.

Defendant was convicted, following a jury trial, of felonious assault, MCL 750.82. He was sentenced as an habitual offender, fourth offense, MCL 769.12, to forty-two months to fifteen years' imprisonment. Defendant appeals as of right, and we affirm.

Defendant's conviction arises from an altercation with his ex-wife. Defendant convinced his ex-wife, the victim, to allow him to come to her home to visit with the couple's children. However, defendant became abusive after the victim refused to discuss her relationship with another man. Defendant grabbed the victim by the throat and held a knife to her throat. He fled the scene after one of the couple's children entered the room. Another daughter testified that defendant was carrying a knife as he fled. When defendant encountered police, he gave a false name and had changed his multi-layered clothing to alter his appearance. Defendant gave a statement to police that corroborated the victim's version of events. However, at trial, defendant testified that the victim lashed out at him, and he accidentally held a makeshift knife to the victim when he tried to hold her back. Defendant was charged with assault with intent to commit murder, MCL 750.83, but was convicted of the lesser offense of felonious assault.

Defendant first alleges that a new trial is warranted based on prosecutorial misconduct. We disagree. Defendant did not preserve this claim of error by timely and specific objection. *People v Schutte*, 240 Mich App 713, 720; 613 NW2d 370 (2000). Unpreserved claims of prosecutorial misconduct are reviewed for plain error. *Id.* To avoid forfeiture under the plain error rule, the error must occur, be clear or obvious, and the defendant must show prejudice or that the error was outcome determinative. *People v Carines*, 460 Mich 750, 761-762; 597 NW2d 130 (1999). Improper prosecutorial remarks do not warrant reversal when responsive to issues raised by the defense, and error requiring reversal will not be found if the prejudicial effect of the improper comment could have been cured by a timely instruction. *Schutte, supra*. Questions of prosecutorial misconduct are reviewed on a case by case basis, examining the pertinent portion

of the record in context to determine if the defendant was denied a fair trial. *People v Noble*, 238 Mich App 647, 660; 608 NW2d 123 (1999).

In the present case, a considerable portion of the trial was devoted to the witnesses' description of the weapon used by defendant in the assault. The victim and her children testified that the weapon was a knife. Defendant testified that he had whittled a "fake knife" from a wooden paint stirrer or stick. Upon questioning by the prosecutor, defendant acknowledged that the term "shank" could refer to a knife. However, defendant refused to characterize his carved paint stirrer as a "shank," but rather, repeatedly referred to the object as a "fake knife." While defendant asserts that the "shank" reference was designed to alert the jury to defendant's prior period of incarceration, neither party introduced defendant's prior prison record or referenced the term "shank" as a knife crafted by prisoners. There is no merit to the argument that the use of the term "shank" by the prosecutor was deliberately injected into the proceeding to arouse prejudice. *People v Bahoda*, 448 Mich 261, 266; 531 NW2d 659 (1995).

We also reject the claim of alleged prosecutorial misconduct based on the prosecutor's reference to consciousness of guilt and the testimony of the couple's minor daughter. Defendant admitted that he fled the victim's home in anticipation of a complaint to police, and evidence of flight is admissible to show consciousness of guilt. *People v Compeau*, 244 Mich App 595, 598; 625 NW2d 120 (2001). Additionally, the prosecutor's argument regarding the testimony of the minor daughter did not improperly vouch for the credibility of the witness, but was responsive to defense arguments regarding her credibility. *Schutte, supra*. Defendant failed to demonstrate plain error affecting substantial rights. *Carines, supra*.

Defendant next alleges that the trial court abused its discretion by admitting evidence of other acts of abuse between the couple, the tape of the 911 call by the victim, and the demonstrative evidence, a paint stick. We disagree. The decision to admit evidence is reviewed for an abuse of discretion. *People v Lukity*, 460 Mich 484, 488; 596 NW2d 607 (1999). In this case, the prosecution sought to introduce evidence of defendant's verbal and physical threats against the victim, not as evidence of his propensity to commit the charged offense, but rather, as evidence of his intent to harm the victim. Because intent was an element of the charged crime of assault with intent to commit murder, evidence of defendant's prior bad acts demonstrating his intent to injure or kill the victim presented a legitimate and material basis for admission. *People v Starr*, 457 Mich 490, 500-501; 577 NW2d 673 (1998). Therefore, the evidence was offered to address an issue other than propensity. *People v VanderVliet*, 444 Mich 52, 74-75; 508 NW2d 114 (1993). The evidence was relevant to an issue or fact of consequence, the probative value of the evidence was not substantially outweighed by the danger of unfair prejudice, and a limiting instruction was provided to the jury. *Id.*

The trial court did not abuse its discretion by admitting the 911 tape. *Lukity, supra*. To admit hearsay evidence under the present sense impression exception, MRE 803(1), the declarant must provide an explanation of a personally perceived event that is substantially contemporaneous to the event. *People v Hendrickson*, 459 Mich 229, 236; 586 NW2d 906 (1998).<sup>1</sup> Statements made within a four to sixteen minute interval after the perceived event

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<sup>1</sup> In *Hendrickson, supra*, three Justices concluded that admission of evidence pursuant to MRE (continued...)

satisfy the substantially contemporaneous requirement. *Id.* at 236-237. In the present case, the victim described the assault upon her less than five minutes after the altercation. Thus, the requirements for admission were established, *Hendrickson, supra*, and the trial court did not abuse its discretion by admitting this testimony. *Lukity, supra.*<sup>2</sup>

The trial court did not abuse its discretion by admitting the paint stick as demonstrative evidence. *People v Bulmer*, 256 Mich App 33, 34; 662 NW2d 117 (2003). Demonstrative evidence is admissible when it aids the factfinder in deciding a matter that is material to the case. *Id.* The evidence must be relevant, probative, and offered as an aid to illustrate testimony regarding issues related to the event. *Id.* To prove the charged crime of assault with intent to commit murder, the prosecutor had to establish an assault committed with an actual intent to kill that would have resulted in a killing if successful. *People v McRunels*, 237 Mich App 168, 181; 603 NW2d 95 (1999). The intent to kill may be established by circumstantial evidence and reasonable inferences and may be proved by inference from any facts in evidence. *Id.* In the present case, the victim and her children testified that defendant was observed with an actual knife. Defendant testified that he had a “fake knife” that fell to the couch, and he inadvertently held it to the victim while trying to restrain her. The paint stick was utilized to demonstrate that the prosecutor’s witnesses could not mistake the paint stick with an actual knife, which was indicative of defendant’s intent. It was established that the paint stick was utilized for demonstrative purposes, and defendant was cross-examined regarding the paint stick. *People v Castillo*, 230 Mich App 442, 444-445; 584 NW2d 606 (1998). There was no abuse of discretion. *Lukity, supra.*

Defendant next alleges that the trial court erred by instructing the jury regarding motive and denying his request for a self-defense instruction. We disagree. “[A] trial court is required to give requested instructions only if the instructions are supported by the evidence or the facts of the case.” *People v Ho*, 231 Mich App 178, 189; 585 NW2d 357 (1998). The applicability of a requested jury instruction to the facts of the case lies within the sound discretion of the trial court. *Id.* Motive may not be an essential element of an offense, but is generally relevant to show the intent necessary to commit murder, *People v Herndon*, 246 Mich App 371, 412-413; 633 NW2d 376 (2001), and the trial court did not abuse its discretion by instructing the jury

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(...continued)

803(1) also required independent evidence of the underlying event that could be satisfied by photographs of the victim’s injuries. *Id.* at 238-239 (Opinion, Kelly, J). A fourth Justice agreed with the independent evidence requirement, but rejected the photographic injury evidence, noting that the injury may have occurred hours before the statement. *Id.* at 251-254. (Opinion, Brickley, J). Rather, the independent evidence requirement would be satisfied if the defendant was observed fleeing the scene at about the same time as the 911 call or if medical treatment was sought and the time of treatment could be verified. *Id.* However, three Justices would have rejected the independent or corroborative evidence requirement. *Id.* at 241-243 (Opinion, Boyle, J). Irrespective of the divergence of opinion surrounding this requirement, we note that independent proof of the assault in this case was established by the testimony of the minor child who walked in on the altercation, another child who saw defendant flee the home, and the injuries sustained by the victim.

<sup>2</sup> Having concluded that the statement was properly admissible pursuant to MRE 803(1), we need not address the admission pursuant to MRE 803(2) as an excited utterance.

regarding the limited use in conjunction with MRE 404(b) evidence. Additionally, the trial court did not abuse its discretion by failing to provide a self-defense instruction. To warrant a self-defense instruction, three requirements must be satisfied: (1) it must appear that the defendant was not the aggressor; (2) the defendant was in danger of suffering grievous bodily injury; and (3) the defendant did not have a route of retreat and his only safety was in repelling the attack by physical means. *People v Turner*, 37 Mich App 226, 229; 194 NW2d 546 (1971). Defendant testified that the victim was the aggressor. However, defendant also testified that he was not placed in fear. There was no evidence of likelihood of injury to defendant or availability of a route of retreat. Accordingly, the self-defense instruction was properly omitted from presentation to the jury. *Id.*

Defendant next alleges that the trial court abused its discretion in scoring the sentencing guidelines and the legislative sentencing guidelines violate the separation of powers clause, Mich Const, art 3, § 2. We find no merit to defendant's claim of scoring errors. A sentencing court has discretion when determining the number of points to be scored, and scoring decisions for which there is any evidence will be upheld. *People v Hornsby*, 251 Mich App 462, 468; 650 NW2d 700 (2002). Furthermore, the challenge to the constitutionality of the legislative sentencing guidelines was rejected in *People v Hegwood*, 465 Mich 432, 436-437; 636 NW2d 127 (2001). In light of defendant's extensive criminal history, the challenge to the proportionality of his sentence is also without merit.

Affirmed.

/s/ Janet T. Neff  
/s/ Karen M. Fort Hood  
/s/ Stephen L. Borrello